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In the Supreme Court of the United States

OCTOBER TERM, 1984

CHARLES G. REMINICK, ET AL., PETITIONERS

v.

JACK MALTZ, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

FRANCIS X. LILLY
Solicitor of Labor

KAREN I. WARD
Associate Solicitor

CAROL A. DE DEO
Counsel for Appellate Litigation

STEVEN J. MANDEL
Attorney
Department of Labor
Washington, D.C. 20210

88 pp

QUESTION PRESENTED

Whether ERISA precludes maintenance of an action in state court for contribution and indemnity brought against trustees of an employee benefit plan premised on their alleged breach of fiduciary duty.

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This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATUTES INVOLVED

1. Section 514 of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1144, provides in pertinent part:

> (a) Except as provided in subsection (b) of this section, the provisions of [29 U.S.C. 1001-1145 and 29 U.S.C. 1301-1461] shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in [29 U.S.C. 1003(a)] and not exempt under [29 U.S.C. 1003(b)]. * * *
>
> * * * * *
>
> (c) For purposes of this section:

(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. * * *

2. Section 502 of ERISA, 29 U.S.C. 1132, provides in pertinent part:

(a) A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter; or

(6) by the Secretary to collect any civil penalty under subsection (i) of this section.

* * * * *

(e)(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

STATEMENT

The Retail Shoe Health Commission (the Fund) is an employee welfare benefit plan covered by the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.* In an action filed in state court in New York, the Fund, along with its trustees, the respondents here, sued petitioners, members of a public accounting firm that provided services to the Fund, for damages resulting from petitioners' alleged negligence. The alleged negligence took the form of the accountants' failure to detect the misappropriation of $765,000 in Fund assets by Jerome Simon, the Fund's administrator. Petitioners then initiated a third party action seeking contribution and/or indemnification under New York's contribution law from respondents and Tolley International Corporation (Tolley), a company that provided actuarial services to the Fund. Tolley, in turn, initiated counterclaims against petitioners, respondents and the Fund, and a cross claim against respondents, all seeking contribution and/or indemnification. The various complaints do not mention ERISA (Pet. App. 6a).

Respondents moved to dismiss petitioners' third party complaint, as well as the counterclaim and cross claim pending against them on the ground that these state claims were preempted by ERISA (Pet. App. 2a). The state trial court denied the motion to dismiss (Pet. App. 11a-15a), reasoning that the availability of the state cause of action for contribution and indemnification is of "significant interest" to the state, whereas the issue is "tangential" to ERISA (*id.* at 15a). The Appellate Division, First Department, affirmed without opinion (*id.* at 9a-10a).

A divided New York Court of Appeals reversed (Pet. App. 1a-8a), holding that because the "gravamen of the claims of both Reminick and Tolley against [the trustees] is breach of fiduciary duties" (Pet. App. 3a), these claims are governed by ERISA. Because United States district courts have exclusive jurisdiction over actions alleging breach of fiduciary duty under ERISA (29 U.S.C. 1132(e)), the Court of Appeals concluded that claims asserted against the trustees may not be heard in the state courts (Pet. App. 4a).

The Court of Appeals also rejected petitioners' argument that Congress's failure to expressly provide parties such as petitioners with a cause of action under ERISA signaled an intent to allow maintenance of contribution actions in state court (Pet. App. 4a-5a). Assuming without deciding that the absence of explicit authorization in ERISA for such contribution actions would prevent petitioners from pressing their claims in any court, the court explained (*id.* at 5a):

> Inasmuch as ERISA preempts all claims based on alleged breach of fiduciary duty on the part of ERISA trustees and vests jurisdiction for their enforcement exclusively in the federal courts, the circumstance that persons in the outboard position of [petitioners] and Tolley may have no statutory standing to bring such an action under the federal regulatory scheme is merely an

> aspect of that scheme. If there is a deficiency or inequity in the scope of [29 U.S.C. 1132(a)], it is attributable to the Act itself and any petition for remedy or correction must be addressed to the Congress.

In a dissenting opinion joined by two other members of the court (Pet. App. 6a-8a) Judge Kaye argued that the state contribution action was not barred simply because persons in petitioners' position were not explicitly authorized to maintain a civil action under ERISA (Pet. App. 7a). Judge Kaye reasoned further that although ERISA might prohibit the commencement of an independent action in state court asserting a breach of fiduciary duty by trustees it does not prevent the state courts from "considering such questions when they are part and parcel of defenses to a cause of action premised on state law" (Pet. App. 7a-8a).

DISCUSSION

In our view the New York Court of Appeals correctly determined that ERISA precludes maintenance of a state court action for contribution and indemnity against employee benefit plan trustees that would impose liability on the trustees for alleged breaches of fiduciary duty. Moreover, the court below correctly held that contribution actions such as the present one may be brought, if at all, only in a United States district court under ERISA. The decision below is consistent with the language and legislative history of ERISA.

In any event, the decision of the New York Court of Appeals is, so far as we are aware, the only reported appellate decision addressing the question presented by this case. The ruling below does not conflict with any decision of this Court, or of any United States court of appeals or state court of last resort. Further review accordingly is unwarranted.

1.a. The preemption mandate of ERISA is of unrivaled breadth. Section 514 of ERISA expressly preempts "any and all State laws" that "relate to any employee benefit plan" covered by ERISA. 29 U.S.C. 1144(a). For this and other statutory purposes "employee benefit plan" is defined to include both pension plans and welfare benefit plans. 29 U.S.C. 1002(3). The Act defines the terms "State law" and "State" broadly to include all state action — including judge-made doctrines and court decisions — having the effect of law that "purport[] to regulate, directly or indirectly, the terms and conditions of employee benefit plans." 29 U.S.C. 1144(c). The only statutory exceptions to this broad preemption principle accommodate state laws regulating insurance, banking, or securities, generally applicable state criminal laws, and the Hawaii Prepaid Health Care Act. 29 U.S.C. 1144(b). None of these exceptions is said to be applicable here. See Pet. 11-12.

As the Court recognized in *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 522-525 (1981), the expansiveness of the preemptive effect of Section 514 is an important feature of the comprehensive regulatory scheme established in ERISA. Subject to the few exceptions explicitly created by the Act, Congress "meant to establish * * * plan regulation as exclusively a federal concern." *Id.* at 523. Both direct and indirect intrusion on the area of exclusive federal authority was barred: "ERISA's authors clearly meant to preclude the States from avoiding through form the substance of the preemption provision." *Id.* at 525. As the Court remarked in *Shaw* v. *Delta Airlines, Inc.*, No. 81-1578 (June 24, 1983), "[t]he breadth of § 514(a)'s preemptive reach is apparent from the section's language": state laws are superseded to the extent that they "relate[] to" any employee benefit plan (slip op. 10). Preemption thus is not limited to "state laws specifically designed to affect employee benefit plans" or even those "dealing with subject

matters covered by ERISA" (*id.* at 11). Nor is it necessary to establish that "the state law[] frustrat[es] congressional intent"; rather the courts must give effect to the plain language of ERISA's preemption provision, it being clear that Congress intended that the exercise of preemption authority be read broadly and non-technically. *Id.* at 10 n.15, 11. In view of its expansive reach, the Court has described Section 514 as a "virtually unique preemption provision" (*Franchise Tax Board* v. *Construction Laborers Vacation Trust*, No. 82-695 (June 24, 1983), slip op. 22 n.26).

b. The legislative history of ERISA confirms that Congress intended to occupy the field with respect to ERISA-covered employee benefit plans by superseding any and all state laws and causes of action affecting such plans. See *Shaw* v. *Delta Airlines, Inc.*, slip op. 11-13. The broad preemption language of Section 514 of ERISA emerged from the Conference Committee. The Committee deliberately rejected the preemption formulations employed in earlier House and Senate versions of the bill, which ousted state regulation only as to matters actually to be regulated under ERISA.[1] The crucial change made by the Conference Committee was to preempt all state laws *relating to plans* covered by the Act, as opposed to those governing *subjects* covered by the Act. In his statement prior to Senate action on the Conference Committee bill, Senator Javits, a principal sponsor of the legislation, explained the concern of the conferees with respect to the adequacy of the scope of the

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[1]See H.R. Conf. Rep. 93-1280, 93d Cong., 2d Sess. 383 (1974). Compare Section 514 of H.R. 2, 93d Cong., 2d Sess. (1974), as passed by the House of Representatives, *reprinted in* Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 94th Cong., 2d Sess., *Legislative History of the Employee Retirement Income Security Act of 1974*, at 4057-4058 (Comm. Print 1976) [hereinafter cited as *Leg. Hist.*]; Section 699 of H.R. 2, as passed by the Senate. *Leg Hist.* 3820.

preemption provisions found in the earlier bills (120 Cong. Rec. 29942 (1974)):

> Both the House and Senate bills provided for preemption of State law, but—with one major exception appearing in the House bill—defined the perimeters of preemption in relation to the areas regulated by the bill. Such a formulation raised the possibility of endless litigation over the validity of State action that might impinge on Federal regulation, as well as opening the door to multiple and potentially conflicting State laws hastily contrived to deal with some particular aspect of private welfare or pension benefit plans not clearly connected to the Federal regulatory scheme.
>
> Although the desirability of further regulation—at either the State or Federal level—undoubtedly warrants further attention, on balance, the emergence of a comprehensive and pervasive Federal interest and the interests of uniformity with respect to interstate plans required—but for certain exceptions—the displacement of State action in the field of private employee benefit programs.

In sum, to assure uniform regulation of employee benefit plans, to provide a clear and effective bulwark against application of inconsistent state laws affecting plan operation, and to avoid extensive litigation concerning the scope of preemption, Congress embodied in ERISA an extremely far-reaching preemption provision. In the view of its sponsors, the breadth of federal preemption was "the crowning achievement" of the legislation (120 Cong. Rec. 29197 (1974) (remarks of Rep. Dent)).

2. a. The New York Court of Appeals correctly determined that Section 514(a) of ERISA precludes maintenance of a state court action to recover contribution or

indemnity from fund trustees in the circumstances of this case. Relying on New York's contribution law, N.Y. Civ. Prac. Law § 1401 *et seq.* (McKinney 1976), petitioners attempt to impose liability on Fund trustees for various alleged breaches of fiduciary duty that are claimed to have contributed to the losses sustained by the Fund. Petitioners now apparently concede (Pet. 19) that ERISA must provide the substantive fiduciary standards for adjudicating such liability, but they contend that the ERISA standards can be applied by a state court in a contribution action under state law, and that such a hybrid proceeding is not preempted. Petitioners fail to recognize, however, that a state law affording a right of contribution necessarily "relate[s] to" an employee benefit plan within the meaning of Section 514(a) because such a right may be employed to fix liability on plan trustees for breach of fiduciary duty. The application of such a law accordingly is preempted regardless of whether it directly frustrates federal policies respecting pension plans.

As we have explained (pages 6-7, *supra*), the Court has interpreted the statutory phrase, "relate to any employee benefit plan," in a broad literal fashion. Application of New York's contribution law runs afoul of Section 514 of ERISA because it would dictate the instances in which fiduciaries and others are to be liable to one another for breach of the fiduciary duties imposed by ERISA. Such a suit is no different, for preemption purposes, from an original cause of action against fund fiduciaries. A right to contribution or indemnification, if it exists at all, must be found in ERISA, at least insofar as the right is asserted to remedy an alleged breach of fiduciary duty. See pages 11-12, *infra*. Otherwise, trustees would be subject to differing state contribution laws—and thus differing fiduciary liabilities—depending on the state in which they operate and the state or states in which such actions might be

brought. Congress preempted state law under Section 514(a) precisely to free plans and their trustees from such inconsistent and varying legal requirements.

By contrast, the original cause of action by respondents and the Fund against petitioners for negligent provision of professional services to the Fund, is not, in our view, preempted under ERISA. That suit apparently did not allege either that petitioners were fiduciaries who breached their duty of care, or that they knowingly participated in or aided and abetted fiduciaries in committing fiduciary breaches. Compare Pet. 20-21 (complaint alleged as background to suit that plan administrator breached *his* fiduciary duty); see *Thornton* v. *Evans*, 692 F.2d 1064, 1077-1078 (7th Cir. 1982). The critical distinction between respondents' action against petitioners and the responsive claim for contribution is that the former does not seek to affix liability for breach of fiduciary duty.

b. Even though there is no explicit provision for such actions in the statute, the Secretary of Labor has taken the position that actions may be brought in federal district court under ERISA for contribution and indemnification, either among fiduciaries or as between fiduciary and non-fiduciary parties at fault. See *Donovan* v. *Robbins*, 752 F.2d 1170, 1178-1179 (7th Cir. 1985); see also G. Bogert, *The Law of Trusts and Trustees* § 701, at 195-198; *id.* § 862 at 35-39; *id.* § 868, at 82-83 (1982 ed.); Restatement (Second) of Trusts § 258, at 650-654 (1959). Assuming that all of the elements of a typical contribution claim can be established here (see *Northwest Airlines, Inc.* v. *Transport Workers*, 451 U.S. 77, 87-88 (1981)), the trustees may, in

our view, be sued for contribution in federal court under ERISA by persons such as petitioners.[2]

Thus petitioners' contention (Pet. 15-19) that the decision below permits trustees to escape responsibility for malfeasance is unfounded. But even if our view as to the availability of contribution in federal court were to prove incorrect, petitioners' position would not be advanced. First, trustees plainly may be sued by the Secretary as well as by plan participants and beneficiaries seeking redress for any breach of fiduciary duty under ERISA. See 29 U.S.C. 1132(a)(2). Thus, even if contribution were unavailable in the federal courts, fiduciary breaches or oversights need not go unredressed. Second, whether or not ERISA allows for a contribution action, state law may not supplement or vary the allocation of financial responsibility established under the federal scheme.

3. a. Assuming that ERISA itself allows for a contribution action to be governed by federal fiduciary standards, such an action can only be maintained in federal court. The New York Court of Appeals correctly recognized (Pet. App. 4a) that any contribution action against Fund fiduciaries that can be brought under ERISA must be heard in federal court. See 29 U.S.C. 1132(e)(1); *Morrissey* v. *Curran*, 567 F.2d 546, 549 (2d Cir. 1977). Congress clearly intended that the federal district courts have exclusive

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[2]In the compass of the present submission we do not undertake to present the argument for implying a right to contribution under ERISA in the federal courts. We note, however, that at least one of the factors that counseled against recognition of a right of contribution in *Northwest Airlines*—the purely statutory nature of the primary liability there (see 451 U.S. at 93-94, 97)—is absent here. Both the action for damages for negligence by petitioners in their accounting services and the cause of action for damages against a trustee for breach of fiduciary duty were recognized at common law.

jurisdiction over suits "involving breach of fiduciary responsibility as well as exclusive jurisdiction over other actions to enforce or clarify benefit rights provided under Title I." H.R. Conf. Rep. 93-1280, *supra*, at 327. Indeed, the Conference Committee, in mandating exclusive federal jurisdiction over such cases, rejected provisions in both the House and Senate bills that would have provided concurrent state and federal court jurisdiction over suits for breach of fiduciary duty.[3]

We recognize that Section 502(e)(1) of ERISA, 29 U.S.C. 1132(e)(1), could be read to leave a loophole for a contribution action such as this in the otherwise general assignment of exclusive jurisdiction over actions arising under ERISA to the federal courts. That is, because the contribution action is not one brought "by the Secretary, or by a participant, beneficiary or fiduciary," the statutory grant of exclusive jurisdiction arguably is not, on its face, applicable. But the legislative history that we have cited clearly reflects Congress's intention that the federal courts exercise exclusive jurisdiction in all matters involving breach of fiduciary responsibility. And it is significant that Congress took care explicitly to establish a single exception to the general rule of exclusive federal jurisdiction: concurrent jurisdiction exists to entertain actions by a participant to recover benefits due under the terms of a benefit plan, 29 U.S.C. 1132(a)(1)(B) and (e). Obviously no similar exception exists for contribution actions. Nor is this difference in the treatment of the two kinds of actions hard to understand. Benefit collection actions, unlike contribution actions, do not require the court to assess liability for breach of federal

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[3]See Section 503(g)(1) of H.R. 2, 93d Cong., 2d Sess. (1974), as passed by the House of Representatives, *Leg. Hist.* 4047-4048; Section 693 of H.R. 2, as passed by the Senate. *Leg. Hist.* 3816-3817.

fiduciary responsibility standards. Thus, to the extent that a federal contribution action may arise under ERISA, the language and policy of 29 U.S.C. 1132(e)(1) require that it be entertained only in federal court.

b. In their argument defending the exercise of state court jurisdiction in this case, petitioners assume (Pet. 12-13) that an insurer may bring a suit in state court against a fiduciary under Section 410 of ERISA, 29 U.S.C. 1110. Section 410 requires that any fiduciary liability insurance policy purchased by a plan for its fiduciaries permit recourse by the insurer against the fiduciary. We agree with respondents' suggestion (Pet. 13) that Section 410 tends to confirm that ERISA may in some circumstances permit maintenance of an action for breach of fiduciary duty by persons other than those enumerated in 29 U.S.C.1132(a). (Section 410 may thus lend some support to the availability of a contribution claim under ERISA itself. See pages 10-11, *supra*.) But it does not at all follow that such suits may be brought in state court. To the contrary, because an insurer's recourse suit rests on subrogation to the plan's claim for breach of duty against a fiduciary, the exclusive jurisdiction provisions of 29 U.S.C. 1132(e)(1) should be directly applicable. See 29 U.S.C. 1132(a)(2), 1109. Similarly, to the extent that a contribution action similarly rests on a subrogation theory —as petitioners assert it does (Pet. 13)—their argument for exercise of state court jurisdiction is undermined, rather than advanced.

Petitioners also rely (Pet. 11) on decisions indicating that a grant of exclusive jurisdiction to the federal courts does not preclude a state court from deciding a federal question that arises "collaterally." See *Hathorn* v. *Lovorn*, 457 U.S. 255, 266 & n.18 (1982). The claim for contribution asserted here, however, is not in any sense a "collateral" incident of a bona fide state action addressed to legitimate state concerns. Rather, it is the essence of the state claim to establish

the liability of respondents as plan trustees for breach of fiduciary duties. Maintenance of this third party claim accordingly draws no support from cases in which a defense of illegality under federal law is permitted to be interposed to a claim that particular conduct is required under state law (see *Bement* v. *National Harrow Co.*, 186 U.S. 70 (1902)), or in which a suit is brought to enforce state contract rights that are affected to some extent by a federal rate schedule (see *Pan American Petroleum Corp.* v. *Superior Court*, 366 U.S. 656 (1961)).[4]

4.a. As we noted at the outset, the decision of the court below does not conflict with any pertinent reported decision of an appellate court. To the contrary, in situations generally analogous to the present case, the federal courts of appeals have given a broad reading to ERISA's preemption provision. See, *e.g.*, *Russell* v. *Mass. Mutual Life Ins. Co.*, 722 F.2d 482, 487-488 (9th Cir. 1983), cert. granted on other grounds, No. 84-9 (Oct. 1, 1984) (state causes of action based on mishandling of disability claim preempted);[5] *Lafferty* v. *Solar Turbines Int'l*, 666 F.2d 408 (9th Cir. 1982) (state breach of contract action relating to administration of plan preempted); *Dependahl* v. *Falstaff Brewing Corp.*, 653 F.2d 1208, 1214-1216 (8th Cir.), cert. denied, 454 U.S. 968 (1981) (state claim of tortious interference with plan preempted).

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[4]Petitioners advert (Pet. 21-22) to the question whether, assuming the state court lacks jurisdiction to entertain their contribution action, they may nonetheless raise a defense of contributory negligence based on respondent's acts or omissions in the state court action brought by respondents against petitioners. The court below did not address this issue and we express no view regarding it at this time.

[5]The question presented to this Court in No. 84-9 is whether, under ERISA, punitive damages may be awarded to an employee benefit plan participant from a plan fiduciary based on the fiduciary's failure properly to process benefit claims. There is no reason to hold this case for disposition in light of No. 84-9.

Cases cited by petitioners (Pet. 9-10 n.1) do not create any conflict with the decision below that would warrant further review. Petitioners rely on a line of cases recognizing a narrow exception to ERISA preemption that permits garnishment of plan benefits to enforce family support and community property obligations embodied in a state divorce decree. See, *e.g.*, *A.T. & T. Co.* v. *Merry*, 592 F.2d 118 (2d Cir. 1978). The rationale for that exception can in no event be extended to a case such as this. In *Shaw* (slip op. 14 n.21) the Court cited *Merry* as illustrating that "[s]ome state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan" within the meaning of Section 514(a) of ERISA. But the effect of imposing fiduciary liability under state contribution law can scarcely be deemed peripheral to the operation of an employee benefit plan.[6] Petitioners also cite cases holding that state fair employment practices laws escape preemption, but these cases have been superseded or qualified by *Shaw*, which teaches that such laws survive as to employee benefit plans only to the extent that they provide a means of enforcing Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and accordingly are sheltered by Section 514(d) of ERISA, 29 U.S.C. 1144(d).[7] Thus petitioners are unable to identify any unimpeached appellate decision that conflicts with the decision below.

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[6]The garnishment cases are also distinguishable because they reflect the traditional reluctance of the courts to find federal preemption of state law pertaining to marriage or the family. See *Hisquierdo* v. *Hisquierdo*, 439 U.S. 572, 581 (1979).

[7]Another case cited by petitioners, *Hotel & Restaurant Employees* v. *Danziger*, 536 F. Supp. 317 (D.N.J. 1982), was reversed on appeal, 709 F.2d 815 (3d Cir. 1983). This Court subsequently vacated the court of appeals' ERISA ruling on the ground that the preemption question was not ripe. *Brown* v. *Hotel Employees*, No. 83-498 (July 2, 1984), slip op. 19-20. The reasoning of still other cases cited by petitioners, such as *Provience* v. *Valley Clerks Trust Fund*, 509 F. Supp. 388 (E.D. Cal.

b. An additional reason for withholding further review in this case is that the question whether an action for contribution under ERISA may be maintained in federal court remains an open one. See pages 10-11, *supra*. Although the availability of such a federal remedy is not essential to the conclusion that a state action for contribution is barred, it is impossible to assess the practical effect of preemption of state contribution actions absent further development of the law regarding the availability of contribution under ERISA itself. Significantly, the thrust of petitioners' argument that the court below erred is simply that some mechanism for securing contribution is desirable (see Pet. 14-20), rather than that the mechanism must be supplied by state law or be made available through the state courts.

CONCLUSION

The petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

FRANCIS X. LILLY
Solicitor of Labor

KAREN I. WARD
Associate Solicitor

CAROL A. DE DEO
Counsel for Appellate Litigation

STEVEN J. MANDEL
Attorney
Department of Labor

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1981), to the effect that the indirectness of the impact of state law on an employee benefit plan is sufficient to avert preemption, has been repudiated by *Alessi* and *Shaw*. See pages 5-6, *supra*.

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